

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

IN RE:

Chapter 13

James Malcolm Winborn and
Peggy Ann Winborn,

Case No. 05-36341-JDL

Debtors.

James Malcolm Winborn and
Peggy Ann Winborn,

Plaintiffs,

Adversary Proceeding

vs.

No. _____

Wells Fargo Bank, National Association,
and America's Servicing Company

Defendants.

COMPLAINT FOR DAMAGES

Comes now the above named debtors, James Malcolm Winborn and
Peggy Ann Kauffman Winborn, and would respectfully represents:

1. Pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure,
plaintiffs would allege that this adversary proceeding relates to the petition filed by
James Malcolm Winborn and Peggy Ann Winborn on October 6, 2005 pursuant to
chapter 13 of Title 11 of the United States Code in the United States Bankruptcy Court
for the Western District of Tennessee, Western Division in case number 05-36341-JDL.

2. That this adversary proceeding is a core proceeding over which this Court has jurisdiction pursuant to 28 U. S. C. Sections 157 and 1334. That Rule 65 of the Federal Rules of Civil Procedure, with the exception of subsection (c) is made applicable by Rule 7065 of the Federal Rules of Bankruptcy Procedure

3. That America's Servicing Company filed a proof of claim in this case that designated that the name and address where notices should be sent is America's Servicing, One Home Campus, Des Moines, Iowa 50328, a copy of which is attached hereto and marked as exhibit A.

4. That America's Servicing Company is not registered to do business in the state of Tennessee.

5. That America's Servicing Company does not have a registered agent for service of process in the state of Tennessee.

6. That from information and belief Wells Fargo Bank, National Association is doing business as America's Servicing Company.

7. That the registered agent for service of process for Wells Fargo Bank, National Association is Corporation Service Company, 2908 Poston Ave., Nashville, TN 37203.

8. That Brice, Vander Linden & Wernick, P. C. filed a Request for Service of Notice in this case requesting that all notice for Wells Fargo Bank, National Association be served on Brice, Vander Linden & Wernick, P. C., Joe M. Lorano, Jr. at P. O. Box 829009, Dallas, TX 75382-9009.

9. The order confirming the plan provided for the curing of the default and the payment of the ongoing mortgage payments on debtor's residential real property

known 3364 McDuff, Memphis, Shelby County, Tennessee be paid through the plan by the Chapter 13 Trustee to America's Servicing Company.

10. Plaintiffs completed all payments under the plan and received their discharge on December 24, 2008.

11. That Ms. Sylvia Brown as the Chapter 13 Trustee filed a motion in this case to show cause why the mortgage should not be shown as current. Subsequently the court granted said motion and an order was entered on December 16, 2008 directing that the defendant to show this mortgage current, a copy of which is attached hereto and marked exhibit B.

12. The trustee paid the ongoing mortgage through the end of January, 2009, and the plaintiffs were to commence paying the ongoing mortgage payments directly to the mortgagee commencing February, 2009. Plaintiffs paid the said February, 2009 mortgage payment to America's Servicing Company but does not know how it was applied.

13. Defendants have deliberately and willfully refused to abide by the orders of this Court and have notified plaintiffs that an arrearage exists for the period of time during the term of the plan and prior thereto and are claiming that plaintiffs are past due in complete disregard of the orders of this Court.

14. Defendants sent plaintiffs a Monthly Mortgage Statement dated January 20, 2009 that show as past due amount of \$1,810.45, a copy of which statement is attached hereto and marked exhibit C.

15. Plaintiffs also received a letter from America's Servicing Company dated January 18, 2009 showing an amount due of \$2,162.95 to cure the default and bring

the loan current as of February 17, 2009, a copy of which is attached hereto and marked exhibit D.

16. Plaintiffs found a hang tag on their door knob dated January 23, 2009 requesting a call from Wells Fargo, a copy of which is attached hereto and marked exhibit E.

17. Plaintiffs will suffer immediate, irreparable injury, loss and damage unless the defendant is restrained from attempting to collect any money for any arrearage, mortgage payments, later charges, attorney fees or any other cost that accrued prior to the discharge and further enjoined from foreclosing on the said real property because of any of said claimed arrears or other charges.

18. The action of the defendants were in willful and deliberate disregard for the orders of this Court and the confirmed plan.

19. That the plaintiffs have incurred attorney fees and cost to enforce the said orders of this Court.

20. That the plaintiffs have incurred additional expenses to enforce the said orders of this Court.

21. That the plaintiffs have suffered emotional pain and suffering.

22. Defendants are and have been at all relevant times the owner and server of this mortgage.

WHEREFORE, PLAINTIFFS PRAY:

1. That a temporary injunction issue enjoining the defendants or any of it's assigns from foreclosing on plaintiff's real property pending the final hearing in this

adversary proceeding, or from transferring the servicing or ownership of this mortgage until there is a final disposition of this adversary proceeding.

2. That a permanent injunction issue enjoining the defendants or any of it's assigns from foreclosing on plaintiff's real property or from collecting any arrearages, fees, attorney fees, late charges and any other cost, that is inconsistent with this order of this Court, due to it's willful refusal to abide by the orders of this court.

3. That plaintiffs be awarded compensatory damages, punitive damages, and court cost and attorney fees against the defendants for their willful and deliberate violation of the orders of this Court.

4. That the court order such other and further relief to which plaintiffs may be entitled.

/s/ Philip F. Counce

PHILIP F. COUNCE, Attorney for Plaintiffs
3333 Poplar Ave., Memphis, TN 38111
Phone: (901) 458-0555

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing "COMPLAINT FOR DAMAGES" and "NOTICE OF ELECTRONIC FILING" was mail or served electronically to the entities listed below under "PARTIES TO SERVE" on February 16, 2009.

/s/ Philip F. Counce

PHILIP F. COUNCE, Attorney for Plaintiffs

PARTIES TO SERVE:

Debtors

Debtor's attorney

Case trustee

America' Servicing Company
One Home Campus
Des Moines, Iowa 50328

America' Servicing Company
Attn: President
One Home Campus
Des Moines, Iowa 50328

Corporation Service Company
2908 Poston Ave.
Nashville, TN 37203

Brice, Vander Linden & Wernick, P. C.
and Joe M. Lorano, Jr.
P. O. Box 829009
Dallas, TX 75382-9009